United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

The court charged the jury on Counts I-IV and on

75-1053

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PAS

DOCKET NO. 75 - 1053

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

ERNEST HARVEY, JUNIOR,

Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S BRIEF

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Attorney for the Defendant-Appellant,

Appointed

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TABLE OF CASES

For the Second Circuit

DOCKET NO. 75 - 1053

UNITED STATES OF AMERICA

vs.

ERNEST HARVEY, JUNIOR

BRIEF FOR THE DEFENDANT

I. STATEMENT OF FACTS

This is a criminal matter brought in U.S. District Court for the District of Vermont, Honorable Albert W. Coffrin, U.S. District Judge, presiding.

The defendant was charged with six counts in an indictment filed in U.S. District court for the District of Vermont on June 25, 1974. Before the jury was charged, the motion of Government to dismiss Count V of the indictment was granted. The remaining offenses charged were substantially as follows:

— Count I charged conspiracy to commit offenses against the United States in violation of Title 18, United States Code, §371.

— Count II charged transportation of dynamite in interstate commerce with knowledge and intent that it would be used to damage and destroy buildings and other real and personal property in violation of Title 18, United States Code, §844 (d) and Title 18, United States Code, §2.

— Count III charged transportation of dynamite in interstate commerce having been previously convicted of burglary, a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, §§842 (i)(1), 844 (a) and 2.

— Count IV charged transportation of dynamite knowing and having reasonable cause to believe that such explosive materials were stolen, in violation of Title 18, United States Code, §§842 (h) and 2.

-- Count V dismissed upon motion of the government as aforesaid.

— Count VI charged conspiracy to violate the civil rights of a citizen of the United States of America resulting in the death of said citizen, in violation of Title 18, United States Code, §241.

Except for Count V as aforesaid, judgment of guilty was entered on each count on February 10, 1975. Defendant was sentenced to the custody of the Attorney General or his representative as follows: On Count I, for five years; on Counts II, III and IV, for ten years on each count, concurrently, but consecutive to the sentence imposed on Count I; on Count VI, for life, consecutively to sentences hereinabove mentioned.

In his opening statement to the jury, Mr. Gray, the Assistant United States Attorney, told substantially the following to the jury [this is not a synopsis of the statement but merely highlights portions relevant to this brief.]

Defendant lives in Barre, Vermont. Gerald Dunham (also known as Gary Dunham) lives just south of Barre, in Williamstown. Byron Nutbrown, III, lived in Barre with his mother.

During July and August of 1973, George Kiblin, a Newport, ~~Vermont~~ New Hampshire, denizen, agreed with defendant and Dunham to burglarize a Lavalley's Lumber Yard in Newport, New Hampshire. In various conversations, Kiblin guessed that the safe at Lavalley's contained at least ten thousand dollars in cash.

The three agreed to divide it equally and the Vermonters were to take their shares back to Vermont.

Also in various conversations, Kiblin said that plenty of "firepower" was needed to break the safe at Lavalley's; and defendant said he would bring "firepower", which Mr. Gray said. . . "meant dynamite and they were going to blow that safe."

On Friday night, August 3, 1973, defendant traveled to Newport, New Hampshire, along with Byron Nutbrown, III, and Dunham to burglarize Lavalley's as planned. They met Kiblin at his home. Kiblin didn't like having young Byron along, and said so. Defendant told Kiblin not to worry about "Buster", as Nutbrown was known, because if he ever talked, defendant would kill him.

All parties then went in defendant's car to a gravel pit, where the break was discussed and defendant gave dynamite to Kiblin. The plan was that Dunham would do the driving, defendant and Kiblin would burglarize Lavalley's and Nutbrown would be lookout. This plan was carried out, except that an alarm went off and the break was interrupted by the Newport Police. Dunham was arrested at the scene with the dynamite hidden in his shirt. Defendant got away. Nutbrown gave a statement to the police, which led to the immediate arrest of Dunham, and later of Harvey.

Dunham and defendant were released after a probable cause hearing. Kiblin was in jail, but was later "on the street". Nutbrown was in custody only briefly the night of August 3, 1973, and was sent home with his mother.

Defendant, Dunham and Kiblin, fearful that the Nutbrown boy would "talk", especially about Federal charges, planned to "get rid" of him. On September 8, 1973, they did just that. Defendant drove Nutbrown to a remote shack where Dunham and Kiblin awaited. Kiblin drove away in defendant's car and returned a few hours later, after dark. Defendant remarked, "that takes care of that little problem." Several months later, Nutbrown's body was discovered naked in a shallow grave near the shack.

The above represents highlights of the government's factual theory as stated in opening statement by Mr. Gray.

The government called Michael M. Patten, a part-time police officer, who said that he caught Kiblin at Lavalley's the night of August 3, 1973, and that he saw defendant running away from the area. On cross examination, he admitted that his "adrenalin was pumping" and that the harsh night lighting cast dark shadows.

The government then called Thomas Mynczywor [pronounced Mints-wahr], a full-time police officer, who said he assisted Patten and they removed a plastic bag of putty-like stuff from Kiblin which stuff was later handed to Sergeant Wade of the Vermont State Police. Mynczywor also witnessed the purported signed statement of Byron Nutbrown, III, which became Government's Exhibit #5 over defendant's objection.

Next the government called Barbara Nutbrown, mother of Byron Nutbrown, III.

Mrs. Nutbrown described the night of August 3, 1973, when she went to New Hampshire to fetch her son Byron. She said that Byron had told her of various activities of defendant. Defendant objected to the hearsay and court over-ruled.

The government then called Laurence Wade, a sergeant of the Vermont State Police. Wade discussed a variety of matters, but primarily he related the hearsay of his interview of Byron Nutbrown, III. This hearsay told the story of the Lavalley's break and was admitted over defendant's objection. Wade also told of receiving the putty-like stuff [taken from Kiblin] and delivering it to the State Police Laboratory for analysis. Wade was cross-examined by defendant as to hearsay [from Gerald Dunham] exculpatory to defendant, but court sustained government's objection thereto.

The government called Harold G. Linde, who said the putty-like stuff delivered to him for analysis was dynamite.

Ronald Woodward was a state policeman specializing in technical matters. He told about the discovery of a body near a remotely located shack in Williamstown, Vermont.

The government thus called Alphonse Morali, a dentist, who told how he prepared the dental charts used to help identify the body of Byron Nutbrown, III.

Raymond Jacobs was called next by the government. He said he was a police officer in Barre, Vermont. He testified, over defendant's objection, that he received many reports of dynamite being stolen from businesses in the Barre area.

Ronald West was the next government witness, and he told of his interview of Byron Nutbrown, III. Over defendant's objections, he related this hearsay which told the story of the Lavalley's break. He also related over

objection, hearsay [from Nutbrown] of defendant's purported admissions of past unrelated crimes.

The government then called Woodrow Wilson Wade who told that he found blasting caps in Lavalley's Lumber Yard on the Monday after the Friday, August 3, 1973, attempted break-in at Lavalley's.

The owner of Lavalley's, Harold Lavalley, was the next government witness. He said he'd received the blasting caps from Woodrow Wade and had turned them over to the Newport, New Hampshire Police.

Then the most critical government witness was called. He was George T. Kiblin. While Kiblin's testimony was extensive—as was cross-examination of him—what follows here is only what is necessary for the purposes of this brief. In essence, Kiblin said that it was originally his idea to burglarize Lavalley's. He said that he lived in Newport, New Hampshire and admitted he had a drinking problem. He said that he'd stolen before to finance his habit. He suggested to defendant that Lavalley's be burglarized. In the weeks prior to August 3, 1973, Kiblin had various personal and telephone conversations with defendant. Kiblin told defendant the safe at Lavalley's was large, and they'd need a lot of "firepower" to get into it. Defendant said he'd "take care of all that". Later, when reminded of the needed "firepower", defendant told Kiblin he'd bring enough. Kiblin told defendant he expected to get about ten thousands dollars, at least, in cash.

On August third, Kiblin said, defendant, Dunham and Byron Nutbrown, III, arrived at Kiblin's Newport, New Hampshire, home for the purpose of burglarizing Lavalley's. Kiblin hadn't expected Nutbrown, a fifteen-year-old boy, and objected to his presence. Defendant said he'd assume responsibility for the boy, and he told Nutbrown that if he got caught and talked, he [defendant] would kill him.

The four drove, in defendant's car, to a gravel pit. There, plans were discussed and defendant gave to Kiblin a packet of dynamite. Defendant carried the caps. Dunham was to drop them off at the lumber yard, Nutbrown was to lookout, and Kiblin and defendant were to break in. This plan was followed up to a point.

Some wires were cut by defendant. Shortly thereafter, someone with a flashlight shouted . . . "'Halt,' he was going to shoot, or something like that. . . ." Defendant and Kiblin both began to run to pick up a bag of [burglary] tools and flee. They collided, and Kiblin sustained a broken collarbone. He fell, and was later apprehended carrying the dynamite. Defendant was not apprehended at that time, but ran off.

At a later time, when Kiblin was out on bail, defendant told him that the dynamite had been stolen from a granite shed. Kiblin did not recall if defendant had told him where the granite shed was located. There is no evidence in the entire case as to the place from which the dynamite had been transported.

Later on, defendant expressed concern to Kiblin about the possibility of Federal dynamite charges. Defendant

also expressed worry over whether Nutbrown had talked to police and whether he would talk.

Considering Nutbrown a "problem", according to Kiblin, defendant enlisted the aid of Kiblin and Dunham. Defendant planned to "get rid" of Nutbrown using Kiblin and Dunham in the process. After some disagreement on Kiblin's part, he said, the three agreed to do it and made plans. On September 8, 1973, Kiblin was at Dunham's home. After a phone call was received by Dunham, Kiblin said, Mrs. Dunham drove Kiblin and Mr. Dunham to a place along a gravel road not far from Dunham's home. Kiblin said he and Dunham cut through the woods to an abandoned shack. Shortly before dark, defendant drove up to the shack with Byron Nutbrown, III, in his car. Defendant and Nutbrown got out of the car. Kiblin said defendant handed the keys to Kiblin and had him take two shovels and a piece of plastic from the trunk. Then, Kiblin said, he drove away, seeing that defendant had his arm around Nutbrown's throat and Dunham also was holding Nutbrown.

Kiblin visited the Blondin's in Chelsea, then returned to the area after dark when, he said, he picked up defendand and Dunham. Kiblin claimed defendant said that the problem was over. Kiblin said the three were later joined by the others' wives and they drove to Claremont, New Hampshire, where Kiblin was let out.

Kiblin then explained that he was testifying under a grant of immunity and expected substantial benefits as a result of his testimony against defendant.

Kiblin's testimony was then interrupted to permit testimony from a young boy named Gary Jacobs [called by

government]. Gary said that Barbara Nutbrown treated Byron quite well.

Kiblin resumed the stand and said none of the conspirators' wives knew what was happening to Nutbrown on September 8, 1973.

On cross-examination, Kiblin admitted he had a drinking problem. He also admitted he'd fought—physically—with Barbara Nutbrown and she gave him a black eye. This story was told more fully by Barbara Nutbrown later, when she was called for the defendant. Also on cross-examination, Kiblin admitted he'd told the grand jury that, at the shack where he last saw the Nutbrown boy, he never saw Nutbrown after he voluntarily got out of defendant's car.

Mr. Gray re-direct examined Kiblin. There was no re-cross.

The government called Dr. Ronald Wright, a qualified pathologist, who described the manner in which he used dental records to identify the body unearthed near the abandoned shack as that of Byron Nutbrown, III. Wright said Nutbrown probably died of mechanical asphyxia, means undetermined. Wright said he found no marks on the chest, mouth, or throat of the body. He said the body had been dead for no less than two or more than ten months.

Armenthia Paul and Edith Blondin were called by the government, and they said they were with Kiblin from about dusk until after dark on September 8, 1973.

Averil Dunham, wife of alleged co-conspirator Gerald Dunham, said that she drove Kiblin and her husband to a

dirt road in late afternoon of September 8, 1973, and she left them there. She also told how she, defendant's wife and Byron Nutbrown, III, all helped to dispose of some unidentified items, by throwing them into a river, on August 4, 1973. As to questions asked by defendant on cross-examination, Mrs. Dunham said, mostly, she did not remember her past statements to law officers. On re-direct, Mrs. Dunham, more cooperatively, said she was testifying under a grant of immunity.

Government then rested.

Defendant made various motions, all of which were denied.

Defendant called six witnesses. Sharon Houle said she was a friend of Byron's and she'd seen Byron Nutbrown, III, after his alleged demise. She was asked by defendant if Byron had any complaints about family life. Government objected, court sustained. On cross-examination by government, Miss Houle admitted she couldn't be sure if she had seen Byron at the time in question. On re-direct, she admitted she told police, back in 1973, that she'd seen Byron on September 10 or 11. She admitted that, at that time, she was sure it was Byron she saw.

Janet Pickett was then called by defendant. She said she knew defendant, Byron Nutbrown, III, Barbara Nutbrown, and Gerald Dunham. She said she'd seen Barbara Nutbrown slap Byron and knock him to the ground; that defendant and Byron were close friends; that Dunham and Kiblin frequently borrowed defendant's car; and that Kiblin frequently drank too much and was known for being unreliable and "telling stories. . . fibs."

Lori Aja, daughter of Janet Pickett, was called by the defendant. She repeated her mother's account of Mrs. Nutbrown's treatment of Byron.

Joseph Aja, son of Janet Pickett, in effect corroborated his mother's testimony.

Wanda Jarvis testified she'd seen Byron after he was reported missing. On cross-examination she admitted she wasn't sure.

Barbara Nutbrown was recalled by defendant. She admitted she'd fought with Kiblin and knocked him down. Also, she admitted she forced barnyard material into his mouth. She also admitted to having said once that she would say whatever was needed to jail defendant.

On cross-examination she told of defendant's admissions of past crimes and of her observation of his participation in past crimes. Defendant objected, but objections were over-ruled.

On re-direct, Mrs. Nutbrown once responded that she had taken a polygraph, and she was telling the truth. Motion for mistrial was made and denied.

Defense rested.

Government brought forth Raymond Nutbrown, brother of Byron. He said he was present at the times and places where Byron had allegedly been seen after his alleged demise [purporting to show that defense witnesses were mistaken].

Government rested.

Defendant renewed all motions made at close of government's direct case and at the bench. Court denied all, except with reference to Count V, later dismissed with prejudice upon government's motion.

The court charged the jury on Counts I-IV and on Count VI. The jury returned verdicts of guilty on all of those counts. Defendant renewed all motions for acquittal, dismissal and mistrial. Defendant newly made motion for judgment n.o.v. All said motions were denied.

Subsequently, judgment on the verdict was entered and defendant was sentenced, all as recited at the beginning of this statement of facts.

II. QUESTIONS INVOLVED

The following questions are involved:

1. Did the court err in admitting into evidence, over defendant's objections, testimonial and documentary evidence of certain extra-judicial statements of Byron Nutbrown, III?

2. a. Did the court err in admitting into evidence, over defendant's objection, testimony of prior related type crimes committed by unknown persons?

   b. Did the court err in admitting into evidence, over defendant's objection, testimony of prior crimes of defendant?

3. Did the court err in excluding from evidence, by sustaining government objections, testimony of hearsay exculpatory to defendant?

4. Should the defendant's motions for mistrial have been granted?

5. Did the court err in denying defendant's motions for dismissal, acquittal and judgment n.o.v. based upon insufficiency of the evidence?

III. ARGUMENT

1. The court erred in admitting into evidence, over defendant's objection, certain out-of-court statements of Bryon Nutbrown, III, as follows:

a. The court so erred in admitting Government's Exhibit #5 purporting to be a signed statement of Byron Nutbrown, III.

Page 202, lines 6, 7 and 8 of the transcript of the trial shows the marking of the exhibit for identification.

Page 210, lines 10-13 of the transcript of trial show government's offer of the exhibit.

Page 218, lines 5-27 through page 225, line 11 show defendant's objection to the exhibit and argument at the bench.

Page 233, lines 19-27 and page 234, lines 1-24 of the transcript of the trial shows the admission of the exhibit and the cautionary instruction which followed.

Byron Nutbrown, III, was not a witness in this case. Government, in the indictment, opening statement and argument, contended Byron Nutbrown, III, was deceased. Government's Exhibit #5 purports to be a statement, uttered by Byron Nutbrown, III, and typed (by a law enforcement officer); and signed by Byron Nutbrown, III. The record does not show other than that the said statement, if made at all, was made while Byron Nutbrown, III, was in custody of police, without benefit of counsel, parent or guardian, while said Nutbrown was not more than 15 years of age; after the termination of any conspiracy in which said Nutbrown might have been a conspirator; and not in furtherance of or to conceal any conspiracy. The statement,

in effect, tells the story of the burglary at a lumber yard in New Hampshire and the participation therein of defendant, Nutbrown, and others. The story appears to match the factual theory of the government as set forth in opening and closing statements to the jury.

b. The court so erred in admitting the testimony of witness Barbara Nutbrown, the mother of Byron Nutbrown, III, purporting to be the substance of out-of-court statements made to her by said Byron Nutbrown.

Page 260, lines 1-6 of the transcript of trial show the questons originally asked by government.

Page 260, line 7 shows defendant's objection to the questions.

Page 260, lines 9-27 and page 261, lines 1-10 show argument at the bench and court's ruling.

Page 261, lines 12-27, page 262, lines 1-27 and page 263, lines 1-8 show the objectionable testimony; and following page 263, lines 11-25, show the cautionary instruction.

The testimony purports to show the substance of verbal statements made to Barbara Nutbrown by her son, said Byron Nutbrown, III. The record does not show other than that the statement was made after the termination of any conspiracy in which said Byron Nutbrown, III, might have been a conspirator and not in furtherance of any conspiracy. The testimony says, in effect, that Byron told his mother that, at defendant's direction, he and defendant's wife and others threw stolen goods including dynamite into a

river after the attempted New Hampshire burglary in August, 1973.

c. The court so erred in admitting the testimony of witness Laurence Wade, Sergeant of the Vermont State Police, purporting to be the substance of out-of-court statements made to him by said Byron Nutbrown, III, to said Laurence Wade.

Page 313, lines 11-20 of the transcript of trial show the questions originally asked by government.

Page 313, lines 21-24 show defendant's objection to the questions.

Page 314, lines 1-27 and page 315, lines 1-19 show argument and court's ruling.

Page 315, line 22-27, page 316, lines 1-27 and page 317, lines 1-24 show the objectionable testimony; and following, page 317, lines 25-27 and page 318, lines 1-11 show the cautionary instruction.

The testimony purports to show the substance of verbal statements made to a law enforcement officer. The record does not show other than that the statements were made, if at all, without Miranda warning, without benefit of counsel, after the termination of any conspiracy in which said Byron Nutbrown, III, might have been a conspirator and not in furtherance of any conspiracy. The statements told, in effect, about circumstances surrounding the burglary of the lumber yard and appears to match the factual theory of government stated in opening and closing arguments.

d. The court so erred in admitting the testimony of witness Ronald West, detective for the Barre City Police, purporting to be the substance of out-of-court statements made by Byron Nutbrown, III, to said Ronald West.

Page 414, lines 26-27 of the transcript of trial and page 415, lines 1-9 show the questions originally asked by the government.

Page 415, line 10 show defendant's objection to the questions and following on line 11 shows the court's ruling.

Page 415, lines 12-27 and page 416, lines 1-27 show the objectionable testimony.

Page 417, lines 3-13 show the cautionary instruction.

The testimony purports to show the substance of verbal statements made to a law enforcement officer by Byron Nutbrown, III. The record does not show other than that the statements were made while Nutbrown was in police custody without Miranda warning, without benefit of counsel, parent or guardian while said Byron Nutbrown, III, was not older than 15 years of age, after the termination of any conspiracy in which said Nutbrown might have been a conspirator and not in furtherance of any conspiracy. The statement tells, in effect, the same story, of the lumber yard burglary, inculpatory to defendant and matching government's theory.

Also, page 415, lines 20-25 appear to show West's testimony of statements made by Nutbrown regarding statements that Nutbrown, in turn, allegedly heard from defendant. To make matters worse, this hearsay-on-hearsay involves past crimes allegedly committed by defendant.

Again, on page 416, lines 12-20 appear to show West's testimony of statements made by Nutbrown regarding statements that Nutbrown, in turn, allegedly heard from George Kiblin (an unindicted co-conspirator and government witness).

There is no evidence in the case which can be reasonably construed to show that defendant or any alleged co-conspirators knew of the existence of the statements made to law officers by Byron Nutbrown, III. And even if they had, arguendo, it would have been irrelevant: Governement, in the indictment, opening statement and argument, contended that said Nutbrown was killed in order to silence him and not on account of having already made said statements or any other statement.

In the bill of Particulars government alleged that said Nutbrown was a co-conspirator in the conspiracy alleged in Count I of the indictment.

An out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime. Wong Sun v U.S., 1963. 83 S. Ct. 407, 418; 371 U.S. 471, 490; 9 L. Ed. 2d 441.

It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one co-conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of an in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than the concealment of the criminal enterprise. Dutton v Evans, 1970. 91 S. Ct. 210; 400 U.S. 74, at 81; 27 L. Ed. 2d 213.

An admission of a co-conspirator after the end of the conspiracy is not admissible against another conspirator. U. S. v DeCicco, C.A. 2d, 1970. 435 F. 2d 478, at 485.

The introduction of the out-of-court statements added substantial and perhaps even critical weight to the government's case in a form not subject to cross-examination. Even in view of the cautionary instruction of the court immediately following the admission of the statements, there was a substantial risk that the jury looked to the incriminating extrajudicial statements in determining defendant's guilt. In these circumstances, admission of the statements violated defendant's right of cross-examination secured by The Confrontation Clause of the Sixth Amendment to the United States Constitution. Bruton v U.S. 1967. 391 U.S. 123, at 126. The cautionary instruction of the court, that the jurors must limit their use of the exhibit and testimony was intrinsically ineffective in that the actual words in the exhibit and testimony and the story they told could not be wiped from the brains of the jurors. Bruton, at 129. The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. Bruton, at 129.

The recent case of Anderson v U.S., (1974) 417 U.S. 211, 94 S. Ct. 2253, might appear to discuss the issues hereinabove presented. However, defendant contends that the Anderson case is not on all fours with the instant case and that its holding in no way derogates any of the principles hereinabove argued.

The Anderson case is distinguishable as follows:

In the Anderson case, we can draw a line between acts of the co-conspirators and admissions of the co-conspirators. The perjured testimony of a co-conspirator was obviously not an admission of that person; it was an act, a thing done in furtherance of the conspiracy.

Also in the Anderson case, the government did not contend that the perjured testimony of a co-conspirator was true in any way. However, although Byron Nutbrown's statements were said not to be admitted to prove the truth of their contents, nevertheless, the government contended, in effect, that what the statements said was true.

Also in the Anderson case, no problem appeared to exist regarding the possibility of cross-examining the makers of the perjured testimony. In the instant case, cross-examination of Byron Nutbrown, III, was according to claim of government, impossible.

For all of the reasons above stated, defendant contends that the court committed prejudicial and reversible error in admitting the above referenced documentary and testimonial evidence of the out-of-court statements of Byron Nutbrown, III; and, therefore, the verdict and judgment should be reversed.

2. a. The court erred in admitting into evidence, over defendant's objection, testimony of Raymond Jacobs of Barre Town Police, of related types of crimes committed by unknown persons.

Page 389 of the transcript of trial, lines 6-12 show the question originally asked by government and the answer of Officer Jacobs immediately following.

Page 389, lines 13-15 show defendant's objection to the question and answer.

Page 389, line 19 through page 398, line 12, shows argument at bench and in chambers and ruling of court.

Page 405, line 2 et seq. shows resumption of testimony but no ruling made or instruction given before the jury or any act from which the jury could have known whether the objectionable matter was to be excluded.

The testimony above referenced said, in effect, that dynamite had from time to time been stolen from businesses within the Barre Town area; and the record as a whole, as to testimony heard by the jury, tended to show that defendant lived and worked in that same area.

b. (i.) The court erred in admitting into evidence, over defendant's objection, testimony of Ronald West, a detective of Barre Police, of prior crimes of defendant.

Page 415 of the transcript of trial, lines 1-9 show the questions originally asked by government and some of the preliminary answers given.

Page 415, line 10 shows defendant's objection to the questions.

Page 415, line 11 shows the ruling of the court.

Page 415, lines 12-25 show the objectionable testimony with particular reference hereby made to lines 20-25.

The testimony above referenced said, in effect, that Byron Nutbrown, III told Officer West that he (Nutbrown) had heard defendant say that he (defendant) had blown the door off a safe in the past and was going to break and enter a wholesale meat place. As stated elsewhere in this brief, this constitutes "hearsay-on-hearsay."

(ii.) The court erred in admitting into evidence, over defendant's objection, testimony of Barbara Nutbrown, mother of Byron Nutbrown, III of prior crimes of defendant.

Page 849 of the transcript of trial, lines 17-27 and page 850, lines 1-3 show the questions originally asked by government and some of the answers.

Page 850, line 4 shows defendants objection to questions.

Page 850, line 5 shows the ruling of the court.

Page 850, line 6 through page 854, line 3 shows the objectionable testimony.

The testimony above referenced, said, in effect, that defendant had previously stolen property in New Hampshire and brought it to Vermont, that defendant immediately thereafter returned to New Hampshire, committed burglary there, and was caught and convicted, in a matter not related to the instant case.

> "Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct . . . . . (T)he prejudice engendered by the admission into evidence of the prior acts of misconduct, <u>even against</u> . . . . . <u>The doers thereof</u>, far outweighed its legitimate probative worth, and . . . it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

(Emphasis added). U.S. v DeCicco, C.A. 2d 1970, 435 F. 2d 478 at 483.

For the reasons stated, defendant contends that the court committed prejudicial and reversible error in admitting the above referenced testimonial evidence of prior related types of crimes of unknown persons and prior crimes of defendant; and, therefore, the verdict and judgment should be reversed.

3. The court erred in excluding from evidence, by sustaining government objections, testimony of hearsay exculpatory to defendant, as follows:

a. The court so erred in excluding the testimony of witness Laurence Wade, Sergeant of the Vermont State Police, which would have shown that Gerald Dunham (also known as Gary Dunham) had made statements to him [Wade] exculpatory to defendant.

Page 335, lines 9-17 of the transcript of trial show questions originally asked by defendant.

Page 335, line 18 shows government's objection.

Page 335, line 21 to page 339, line 21 show argument at the bench and special reference should be made to page 339, lines 18-21 for the ruling of the court.

The excluded testimony would have shown, in effect, that Dunham told Wade something that would have contradicted [the testimony of Special Policeman Patten (a government witness)] that Ernest Harvey was seen by Patten attempting to break into a building at the lumber yard in New Hampshire. Special reference is hereby made to page 335, line 27 to page 336, line 7 of the transcript of trial, which shows defendant's offer at the bench. There can be no doubt

that defendant's offer clearly indicated the expectation of exculpatory hearsay.

b. The court so erred in excluding the testimony of witness Sharon Houle, a friend of Byron Nutbrown, III, which would have shown that said Byron Nutbrown, III, had made statements to said Sharon Houle exculpatory to defendant.

Page 781, lines 3-10 show the questons originally asked by defendant.

Page 781, line 11 shows government's objection.

Page 781, line 15 to page 784, line 23 show argument at the bench and court's ruling.

The excluded testimony would have shown in effect, that Byron Nutbrown, III, told Sharon Houle that he was sick and tired of staying home all the time, that he was tired of babysitting and that he was planning to run away all within a short period of time before his alleged disappearance. Also, the excluded testimony would have shown, in effect, that Byron Nutbrown, III, told Sharon Houle that he [Nutbrown] would try to get into big trouble so that he could get into Week's School [State juvenile corrections facility] to get out of the house, away from home. Special reference is hereby made to page 781, line 24 to page 782, line 8 of the transcript of trial, which shows defendant's offer at the bench. There can be no doubt that defendant's offer clearly indicates the expectation of hearsay contrary to the theory of the government and exculpatory to defendant.

Special reference is also hereby made to page 782, lines 8-18 showing defendant's rationale.

Defendant should have been permitted to show hearsay that is exculpatory. Ferguson v State of Georgia, 1961, 81 S. Ct. 756, 773; 365 U.S. 570, 602; 5 L. Ed. 2d 783. Also, U.S. v Freeman, CA 2d 1962, 302 F. 2d. 347, 351; Certiorari denied 84 S. Ct. 448, 375 U.S. 958, 11 L. Ed. 2d 316.

For the reasons above stated, defendant contends that the court committed prejudicial and reversible error in excluding the above referenced testimony of exculpatory hearsay; and, therefore, the verdict and judgment should be reversed.

4. The court erred in failing to grant defendant's motions for mistrial as follows:

a. The court so erred in failing to grant defendant's motion for mistrial for failure to sequester the jury.

Referring now to the transcript of the pre-trial hearing of September 20, 1974, the issue of sequestration of the jury was raised by the court on page 109 and was discussed by court and defendants on pages 109-112.

Defendant's request for sequestration appears on pages 109-110.

Referring now to the transcript of trial, page 999, lines 11-14 show defendant's motion for mistrial.

Page 999, lines 15-19 show discussion with court.

Page 999, line 20 shows the court's ruling, denying the motion.

Court should have granted defendant's request to sequester the jury. U.S. v Breland (Ca 2 N.Y.) 376 F2d 721;

Tyler v U.S. (Ca 5 Ga) 397 F2d 565, rehearing denied 394 U.S. 917, 22 L. Ed. 2d 450, 89 S. Ct. 1187.

b. The court so erred in failing to grant defendant's motion for mistrial for failure to grant defendant's motion to produce statements of co-conspirators under rule 16 (b) F.R. Cr. P. with particular request for statements of Byron Nutbrown, III.

Referring now to the transcript of the pre-trial hearing of September 16, 1974, page 30 shows the court's reference to the motion and the defendant's particular request for any statements of Byron Nutbrown, III.

Page 31 shows government's response and, particularly these words:

> "First of all, your Honor, we certainly acknowledge that Section 3500 doesn't apply to any statement that may have been made by Byron Nutbrown."

Page 31 shows court's response and, particularly these words:

> "Well, I have given this matter some consideration, but, Mr. Gray, based upon what has been filed by counsel both for the defendant's and the Government, and I think it is governed by 3500."

[Emphasis added]. (The government alleged Nutbrown was dead, and he was not a witness in this case).

Page 32 shows that court reserved final ruling on the matter until a later hearing.

Now referring to the transcript of the pre-trial hearing of September 20, 1974, page 3 shows the court's ruling denying all aspects of the motion, and defendant's objection to the ruling.

As referenced in the first argument above made, the government did introduce at trial a document purporting

to be a signed statement of Byron Nutbrown, III. The court also as referenced above, admitted same into evidence as Government's Exhibit #5. The recitations contained in the first argument above made [starting on page 14, supra] demonstrate prejudice to defendant by denial of the Rule 16 (b) motion. Clearly, Government's Exhibit #5 is a document which the court deemed relevant and is within the ambit of Rule 16 (b) F.R. Cr. P. The exhibit would obviously have been extremely useful to defendant in preparing a defense. Therefore, it was error for the court not to allow its discovery by defendant. Brady v Maryland, 373 U.S. 83 (1963); Dennis v U.S. (1966), 384 U.S. 858, 873; 86 S. Ct. 1840; 16 L. Ed. 2d 973.

c. The court so erred in failing to grant defendant's motion for mistrial made upon the grounds that witness Barbara Nutbrown volunteered that she had taken and passed a polygraph test and therefore was telling the truth.

On page 855, line 14 of the transcript of trial, the relevant portion of redirect examination begins.

Page 857, lines 21-24 show the improper utterance of the witness.

Page 858, line 3019 shows motion made at the bench, with argument following to page 860, line 22.

Page 860, lines 21-24 show affirmation of motion and the court's ruling denying same.

The testimony, in effect, deals with the truthfulness of what the witness had told a police officer about activities of the defendant. The improper testimony, in effect, was that witness had taken a polygraph which showed she'd told the truth.

Evidence of polygraph results is inadmissible. Faye v U.S., 293 Fed. 1013, 1914. (CA DC 1923); Marb v U.S., 260 F2d 377 (CA 10th 1958), Certiorari denied 358 U.S. 929; U.S. v Fay, 284 F2d 426 (CA 2d 1960), Certiorari denied 365 U.S. 850.

In this case, the inadmissible testimony was not responsive, was within the hearing of the jury, and may well have raised (in the minds of the jurors) inferences which were improper.

For the reasons stated, defendant contends that the court committed prejudicial and reversible error in denying the above referenced motions for mistrial; and, therefore, the verdict and judgment should be reversed.

5. The court erred in denying defendant's various motions to dismiss and acquit and for judgment n.o.v.

Page 767, lines 4 and 5 of the transcript of trial show the government rested its direct case.

Following, page 767, line 18 to page 778, line 24 shows defendant's motions at close of government's direct evidence, discussion and argument and court's denial of each motion (except as to Count V, which was later dismissed with prejudice).

Page 991, line 6 to page 994, line 25 shows the verdict of the jury and the poll of the jury.

Page 998, line 2 to page 999, line 10 shows the renewal and restatement of motions for acquittal and dismissal and a newly made motion for judgment n.o.v., and the court's denial of the motions.

The above referenced motions and this argument are grounded on the insufficiency of the evidence to sustain a conviction on any of the counts as alleged.

For the purposes of this brief, the said motions will be discussed together.

Also for the purposes of this brief, discussion of an element of proof common to more than one count will be discussed with reference to all of the counts to which it is common.

Reference may be made to the indictment regarding the charges contained in each count.

In regard to Counts II, III and IV, there is one common element which government must have proved to establish the offenses charged. As regards this case, the government must have introduced evidence from which the jury could reasonably have found that defendant transported dynamite from Vermont to New Hampshire.

Assuming arguendo that dynamite was properly identified as the substance found on George Kiblin and that Kiblin received the dynamite from Harvey, the only reference in the entire evidence to the source of the dynamite is found in the transcript of trial from page 485, line 10 to page 486, line 8. In that examination and testimony, government (Asst. U.S. Attorney Gray) asked Kiblin, in effect, if defendant ever told Kiblin where the explosives had come from. Kiblin answered, in effect, that defendant told him that the defendant broke into a granite shed and got them. Government then asked if defendant ever told Kiblin where the granite shed was. Kiblin answered, "He may have told me, but I don't remember that."

Thus, there is no evidence whatsoever from which the jury could reasonably have found that defendant transported dynamite from Vermont to New Hampshire.

Further, Kiblin's above referenced claim, that defendant admitted that the dynamite was stolen, is corroborated nowhere in the entire trial evidence. The uncorroborated testimony of a co-conspirator, of an admission of defendant, standing alone, is not sufficient to warrant a conviction. Wong Sun v U.S. (1963), 83 S. Ct. 407; 371 U.S. 471, at 489-90; 9 L. Ed. 2d 441.

Count 1 of the indictment charges defendant with conspiracy to, in effect, transport stolen dynamite interstate and transport stolen goods interstate. Defendant submits that no evidence was before the jury from which they could reasonably have found that defendant entered into any agreement to transport dynamite or stolen property interstate. Again, Kiblin's above referenced claim, that defendant admitted the dynamite was stolen, is not sufficient to convict without corroboration. Furthermore, Kiblin claimed the admission was made after the Lavalley's break. Wong Sun v U.S., supra.

As regards, Count VI of the indictment, defendant contends that, without the support of Counts I, II, III and IV, there can not be sufficient evidence to warrant conviction of Count VI. The indispensable element of specific intent is missing without all of the evidence necessary to convict under the first four counts.

For the reasons stated, defendant contends that the court committed prejudicial and reversible error in denying the above referenced motions for dismissal, acquittal and judgment n.o.v.; and defendant contends that the evidence was insufficient to

warrant conviction of any of the offenses alleged; and, therefore, the verdict and judgment should be reversed and the defendant acquitted of all counts.

IV. CONCLUSION

1. The court erred in admitting into evidence, over defendant's objection, testimonial and documentary evidence of certain extra-judicial statements of Byron Nutbrown, III.

2. The court erred in admitting into evidence, over defendant's objection, testimony of past crimes committed by unknown persons and past crimes allegedly committed by defendant.

3. The court erred in excluding from evidence, by sustaining government objections, testimony of hearsay exculpatory to defendant.

4. The defendant's motions for mistrial should have been granted.

5. The defendant's motions for dismissal, acquittal and judgment n.o.v., based upon insufficiency of the evidence, should have been granted.

Wherefore, the judgment should be reversed on all grounds, the indictment dismissed, the motion for a direct verdict of acquittal granted, and the defendant discharged.

Respectfully submitted,

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